

8.

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95-1906. Decided January 6, 1997

JUSTICE BREYER, concurring.

I join the Court's *per curiam* opinion while noting that it poses no obstacle to the Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant.

In telling judges in ordinary cases to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," United States Sentencing Commission, Guidelines Manual §1B1.3(a)(2)(Nov. 1995)(USSG), the Guidelines recognize the fact that before their creation sentencing judges often took account, not only of the precise conduct that made up the offense of conviction, but of certain related conduct as well. And I agree with the Court that the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted that defendant. To that extent, the Guidelines' policy rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions.

This truth of logic, however, is not the only pertinent policy consideration. The Commission in the past has considered whether the Guidelines should contain a

2/1/97

specific exception to their ordinary "relevant conduct" rules that would instruct the sentencing judge not to base a sentence enhancement upon acquitted conduct. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62832 (1992) (proposed USSG §1B1.3(c)). Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands.